No. 89-1493

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
*Petitioner,*

v.

JOSEPH E. O'NEILL, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF FOR THE RESPONDENTS

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## COUNTERSTATEMENT OF QUESTION PRESENTED

This duty of fair representation case involves an international union's settlement of a strike on terms that even the district court acknowledged were atrocious. The record contains substantial evidence that, *inter alia*, the union did not consult or obtain approval from its striking members, though committed to do so, conceded superseniority to strikebreakers, and disenfranchised the strikers from voting in the succeeding union election, thus perpetuating the settling officials in office.

In these circumstances, did the court of appeals correctly conclude that the matter could not be concluded on summary judgment, but warranted trial?

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## OPINIONS BELOW

The issue in this case is whether, on summary judgment, the district court correctly held that ALPA could settle a strike against Continental Airlines, Inc. by abandoning its striking pilots in favor of Continental's strikebreakers. This is an intensely factual matter, but the district court gave no written explanation for its rulings either originally or on court-invited motion for reconsideration; it did, however, acknowledge that the strike settlement was "atrocious in retrospect." The district court entered summary judgment for ALPA because the strike settlement was entered as a bankruptcy court order and award, and because the district court believed the union's conduct could not be translated into personal animosity or illegal motives against its member pilots (JA 73-76).[1]

The United States Court of Appeals for the Fifth Circuit reversed the district court's grant of summary judgment on the duty of fair representation claim in an opinion reported at 886 F.2d 1438 (5th Cir. 1989). The Fifth Circuit denied petitions for rehearing and rehearing en banc in an unreported order.

## JURISDICTION

This Court's jurisdiction to review the judgment of the court of appeals by writ of certiorari is founded on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves a union's duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA").

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[1] "JA" references are to the Joint Appendix; "R" references are to the district court docket sheet.

## STATEMENT OF THE CASE

### A. The Beginning of the Strike and How Strike Decisions Were Supposed to Be Made.

ALPA was the authorized collective bargaining representative under the RLA for pilots employed at Continental Airlines, Inc. ("Continental"), and for approximately forty years prior to these events had collective bargaining agreements with Continental. On September 24, 1983, Continental filed for protection under Chapter 11 of the Bankruptcy Code, rejected its collective bargaining agreement with ALPA, and instituted "emergency work rules" that cut pilot wages and benefits by more than half (R 131, p. 2; R 149, Ex. 102). ALPA, upon a vote by the Continental Airlines Master Executive Council ("MEC"),[2] responded by calling a pilot strike effective October 1, 1983. The members of the plaintiff class dutifully withheld their services under ALPA's direction until the strike ended two years later, on October 31, 1985.

ALPA representatives met periodically with Continental throughout the strike to negotiate a collective bargaining agreement and a strike settlement. ALPA's negotiations were to be carried out through the MEC and in accordance with ALPA's Constitution and Bylaws and the MEC's Policy Manual. Specifically, the Policy Manual called for appointment of a pilot Negotiating Committee expressly charged with keeping the MEC fully informed about the negotiations. It also required approval by the elected MEC representatives of any agreement reached

[2] The MEC consisted of nine Continental pilots elected by the general membership. The MEC was ALPA's local governing body for the Continental pilots and, unless otherwise noted, references to ALPA in this brief include the MEC. Each of ALPA's represented airlines has its own Master Executive Council.



with Continental (R 149, Ex. 49, Chap. 17).[3] The ALPA Constitution further required any agreement to be submitted to ALPA's national organization and signed by ALPA's national president, Hank Duffy.

Additionally, and as contemplated by ALPA's Constitution, the MEC passed a resolution near the beginning of the strike requiring the pilots to ratify any agreement granting concessions to Continental (R 132, p. 17; R 163, Att. 5.1, pp. 507-513). There was undisputed evidence below that ALPA also promised the pilots throughout the strike that they would have the opportunity to ratify any agreement with Continental, not just one granting concessions (R 149, Exs. 47, 56, 78, Exs. 94, 95, 96; R 163, Att. 5.1, p. 569).

### B. ALPA's Misrepresentations During the Strike.

For more than a year prior to the strike settlement, ALPA misrepresented what it was doing to protect the striking pilots. For example, ALPA promised pilots whom Continental had coerced into premature retirement or resignation that they would be included within the strike settlement[4] (R 149, Exs. 42, 43, 91). The majority of the more than 300 strikers who submitted "retirement" or "resignation" letters to access their retirement funds did so in reliance upon ALPA's assurances. By at least May 8, 1985, ALPA had decided to exclude the retired and

[3] These reporting and approval requirements were made part of the Policy Manual in the early 1980's in response to actions by a rogue negotiating committee that reached an agreement without reporting to the MEC (R 149, Exs. 57, 58).

[4] Throughout the strike Continental coerced striking pilots to retire or resign by, among other things, withholding distribution of their retirement funds. The applicable retirement plan required Continental to distribute these funds in mid-1983 when it ceased making contributions to it, but Continental held the funds hostage and required financially distressed strikers to submit retirement or resignation letters as a condition of receipt. *In re Continental Airlines Corp.*, Consolidated Case No. 83-04019-H2-5, unpublished order dated December 12, 1988, pp. 3-4.

resigned pilots from any settlement (R 163, Att. 5.2, p. 674; Att. 7.22, p. Z15672). It never disclosed this decision to the pilots and many of them unwittingly retired or resigned during the strike's final months in the reasonable expectation that ALPA would protect them (R 149, Exs. 43, 47).[5] The final strike settlement expressly excluded the retired and resigned pilots from returning to work (JA 10).

ALPA also represented to the striking pilots that it would not accept any agreement with Continental that did not preserve their seniority. ALPA promised the pilots who remained loyal and stayed out on strike that it would take Continental "all the way to the Supreme Court" (R 168, Ex. B, p. 8)[6] if necessary to protect their rights. ALPA broke this promise and, as a result, the final strike settlement substantially favored the nonstriking pilots in terms of seniority.

### C. Continental's "Withdrawal" of Recognition and the 85-5 Bid.

Continental and ALPA negotiated off and on until August 26, 1985, when Continental announced it was withdrawing recognition of ALPA as the pilots' statutory bargaining representative (JA 80). Until the present litigation, ALPA maintained that Continental's withdrawal

[5] For example, in September 1985, at least four months after deciding to exclude the retired and resigned pilots, ALPA president Duffy wrote the following to a pilot who had inquired whether ALPA was still representing retired and resigned pilots in negotiations: "When it comes time to sit down to negotiate a back to work agreement, it is the MEC's full intention to represent all [Continental] pilots" (R 149, Ex. 91.1).

[6] Ironically, ALPA's promise to go to the Supreme Court is one of the very few promises it kept.



was without legal effect, and in fact Continental continued to bargain with ALPA.[7]

On September 9, 1985, Continental posted Supplementary Base Vacancy Bid 1985-5 ("the 85-5 bid"), which announced pilot positions, or "vacancies," Continental projected for 1986 (JA 80).[8] The 85-5 bid included over 400 pilot positions and was the largest bid in Continental's history. Realizing that the bid could effectively lock striking pilots out of positions, particularly captaincies, for many years, the MEC authorized striking pilots to make offers to return to work and to submit bids. Continental initially accepted the strikers' 85-5 bids, but later announced it would not honor them. Continental "awarded" the 85-5 bids sometime in October 1985 meaning that it matched the name of each bidding nonstriking pilot to a projected vacancy according to Continental's seniority bidding system. As of the end of the strike, however, the positions had not actually been filled and there was no evidence that Continental had even scheduled any pilots for training for these future positions (R 163, Att. 5.2, pp. 627, 895).

[7] In its motion for summary judgment in the district court, ALPA asserted it did not owe a duty of fair representation to these pilots because Continental did not recognize it as the pilots' statutory bargaining representative (R 131, pp. 27-31). ALPA argued that it was simply the common law agent for the striking pilots (*id.*). Thus, ALPA made no effort in its summary judgment motion to show that it fulfilled its duty to the pilots.

[8] Continental identifies pilot jobs (or "seats") by a combination of status (captain, first officer, second officer), equipment (type of plane), and base (city out of which they fly) (JA 80). For example, a pilot might be a captain on a 737 flying out of Houston. Continental periodically posts job vacancies and permits pilots to "bid" for them according to seniority, as measured by initial date of hire (*id.*). This seniority bidding system is used throughout the airline industry, and Continental used it before and during the strike (JA 91, n.3).

D. **The Events of September 1985.**

On September 19 and 20, 1985, top ALPA officials and the Continental MEC officers (but not the pilots' elected MEC representatives) met secretly at ALPA headquarters in Washington, D.C. (R 149, Ex. 67).[9] Testimony in the record reveals that ALPA decided at this meeting to end the strike and to cut off its financial support to the striking pilots (R 149, Exs. 67, 69). The MEC officers, under the direction of ALPA counsel Bruce Simon, were dispatched to end the strike.

On September 21, 1985, the MEC convened its monthly meeting in Washington, D.C. without any knowledge that ALPA had wrested away the MEC's decisionmaking authority and had decided to end the strike.[10] While the MEC was meeting to discuss how to proceed with the strike (R 149, Ex. 67), ALPA president Duffy was across town informing non-Continental pilots that the strike was ending and a premature press release was issued announcing that the MEC had so decided (R 149, Ex. 68; Ex. 78).

Contrary to ALPA's plans, the MEC did not end the strike at its September meeting (R 149, Ex. 3.1). Instead the MEC resolved to convene one more round of negotiations for the sole purpose of seeking a return to work with seniority (R 149, Ex. 3.1, pp. Z002983-Z002984). Toward that end, the MEC passed a resolution known as Resolution 3, which provided:

[9] The MEC representatives are elected by the pilots, and the MEC officers are then appointed by the MEC representatives. The MEC officers at this time were Dennis Higgins, chairman, Peter Lappin, vice-chairman, and Donald Henderson, secretary-treasurer (R 149, Ex. 3.1).

[10] Notes passed discretely between MEC chairman Higgins and vice chairman Lappin at this meeting confirm their marching orders from ALPA to end the strike. Lappin asked Higgins, "Is the MEC supposed to pull the strike down?," and received the written response "yes . . ." (R 149, Ex. 46).



> Be it resolved the equitable solution and settlement of outstanding issues be pursued under the direction of the MEC officers and Negotiating Committee Chairman.

(*Id.*, p. Z002985).

During the present litigation, ALPA has construed Resolution 3 to mean that the MEC officers and the negotiating committee chairman had actual authority to reach a settlement agreement without obtaining either MEC approval or pilot ratification, as otherwise required (R 132, 153).[11] MEC representative John Prater, who seconded Resolution 3, however, testified by affidavit that Resolution 3 meant the pilot negotiators were to *pursue* a resolution but had no authority to reach a final agreement except through normal approval procedures (R 149, Ex. 67). Another MEC member, Harry Parker, had a similar understanding of Resolution 3 (R 149, Ex. 48).

In response to a question posed to him at the meeting, MEC Chairman Higgins, one of the officers in attendance at the secret September 19-20 ALPA meeting, reiterated the understanding that negotiators were only to pursue a settlement, and his comments were memorialized in notes of the meeting kept by the MEC Vice Chairman Lappin (R 163, Att. 7.23, p. Z012255). Higgins' comments are excluded from the official minutes of the meeting, which ALPA did not prepare until *after* the present litigation commenced (R 149, Ex. 3.1, p. Z002979; Ex. 81, pp. 381-84).[12]

E. **The Events of October 1985.**

In early October 1985, MEC officers Higgins, Lappin, and Henderson and Negotiating Committee chairman

[11] This would be contrary to the MEC Policy Manual, which required notice to the pilots and a special vote to alter its provisions (R 149, Ex. 49, Chap. 1).

[12] Other than the omission of Higgins' comments, the minutes track Lappin's notes precisely (R 149, Ex. 3.1).

Kirby Schnell (collectively the "pilot negotiators"), and ALPA counsel Bruce Simon acting, in his words, as president Duffy's delegate, renewed settlement negotiations with Continental (R 163, Att. 5.6, p. 131). ALPA enlisted Bankruptcy Judge Roberts, who presided over the Continental bankruptcy, to participate in the negotiations. From that point forward ALPA refused to share details of the negotiations with the pilots or their elected MEC representatives (R 149, Ex. 66, pp. 2-3, Ex. 48, p. 3; R 163, Att. 5.2, pp. 646-47). To explain their silence, Simon told the pilot negotiators, who then told the MEC, that Judge Roberts had issued a "gag order" on the negotiations that precluded them from sharing information (R 149, Ex. 48, ¶ 6, Ex. 66, pp. 2-3). When deposed, Continental negotiators admitted they never heard of such a gag order (R 149, Ex. 10, pp. 67-69; R 163, Att. 5.6, pp. 84-85). While the gag order supposedly was in place, Continental was openly sharing negotiating proposals with its advisory group of nonstriking pilots (R 149, Ex. 10, pp. 67-68; R 163, Att. 5.6, p. 82). Meanwhile, Simon himself kept Duffy personally apprised of the negotiations (R 163, Att. 4).

Undisputed record evidence demonstrates that by this point in time, ALPA (1) knew that Continental had previously returned striking machinists and flight attendants to work with their seniority intact when their unions made unconditional offers to return to work (JA 91, n.3; R 163, Att. 5.5, pp. 60-61, 166); (2) had received legal advice from its own lawyers that Continental would be required to fill *all* vacancies with returning strikers, just as United Airlines had been required to do in litigation ALPA successfully concluded less than two months earlier (R 163, Att. 5.1, pp. 213-17, Att. 5.5, p. 165); [13] and (3) had been informed by Continental that it would

[13] *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).



reinstate strikers with full seniority if ALPA made an unconditional offer to return to work (JA 91, n.3; R 163, Att. 1, Att. 5.5, pp. 165-70).

There is no evidence in the record, either by way of documents or deposition testimony, that ALPA was uncertain about the law governing the rights of returning strikers. The only advice given was that Continental would be required to adhere to the district court results it obtained in the United Airlines litigation. There also is no evidence in the record that ALPA's agreement to the strike settlement was motivated by concerns about the law. Indeed, in November 1985, when ALPA explained the settlement to its members, it never once mentioned that it conceded seniority because it was uncertain about the legal rights of the striking pilots (R 149, Exs. 71, 73).

The record suggests that ALPA wanted to settle the strike on a negotiated basis, even if that settlement was worse than an unconditional offer to return to work. Therefore, ALPA never communicated to the MEC Continental's offer to honor the striking pilots' seniority if they would unconditionally return, and it never seriously considered that proposal.

Not only did ALPA want a negotiated settlement, it devised one for which it would not have to accept responsibility. Thus, by late October 1985, ALPA conceived a way for the strike settlement to be "imposed" so that president Duffy would not take blame for it. On October 18, 1985, Duffy sent a mailgram to the ALPA Board of Directors saying that he planned to obtain a court-ordered settlement (R 163, Att. 7.3). ALPA counsel Simon's notes of October 25 reflect his *ex parte* conversation with Judge Roberts in which Simon urged Roberts to be "creative" and to consider imposing the settlement as a court order (R 163, Att. 4). On October 29, Simon made the same request to the Continental negotiators, who understood that a court order was necessary for the set-

tlement to occur (R 149, Ex. 9, pp. 177-179, Ex. 10, p. 115). [14] Simon's position contravened the ALPA Constitution and Bylaws, which expressly require the ALPA president's signature on all agreements (R 149, Ex. 8, p. 58).

Once it knew that Judge Roberts and Continental would agree to entry of the strike settlement as a bankruptcy court "order and award," ALPA conceded almost all outstanding issues and rushed the matter to conclusion (*compare* R 149, Exs. 7.1 and 7.2 to JA 7-41). It submitted the settlement to Judge Roberts on October 31, 1985 and he signed it the same day.

The concessions ALPA made in the settlement were extreme. As MEC negotiating committee chairman Schnell's contemporaneous notes state, the settlement agreement "bastardized [seniority] beyond all recognition,"

[14]The pilots were scheduled to depose Simon on Dec. 2, 1987, after successfully fighting ALPA's assertions of privilege and trying to schedule the deposition for over 11 months, but the summary judgment bench ruling on Nov. 30, 1987 denied them that opportunity. Although the pilots began to depose ALPA attorney Savelson, that deposition was incomplete when the district court ruled.



and "f—ked my people forever" (R 149, Ex. 1). [15] Schnell explained these comments later in his deposition when he said the union negotiators had "gone beyond what was reasonable" (R 163, Att. 5.1, p. 1099).

### F. ALPA's Denials and Misrepresentations Concerning the Strike Settlement.

From the moment the bankruptcy court entered the secret strike settlement as an order, ALPA denied any responsibility for its terms. It told the striking pilots that the bankruptcy court "imposed" the settlement and denied that it had agreed to any of the settlement's major provisions (R 149, Exs. 14, 15). It also misrepresented that the settlement had any effect whatsoever on seniority (*id.*). ALPA similarly misrepresented the settlement to its members at other airlines (R 149, Ex. 16).

When the striking pilots instituted the present litigation, ALPA did not attempt to justify or rationalize the settlement in any way. Instead, it maintained that it owed the pilots no duty of fair representation because Continental had ceased recognizing it as the pilots' exclusive bargaining representative in August 1985 (R 131,

[15]The suggestion in ALPA's brief that the bankruptcy court's approval somehow sanitizes what ALPA did deserves short shrift. First, as the Fifth Circuit noted, the bankruptcy court had virtually no function in reviewing or agreeing to the order and award. It merely issued the agreement that ALPA and Continental submitted to it (R 163, Att. 12.2). Second, the bankruptcy court's determination deserves no deference because, as the Fifth Circuit found in a related case, the bankruptcy judge was compromised and should have recused himself. Specifically, the bankruptcy judge accepted employment with the law firm representing Continental shortly after making a number of dispositive rulings, including a ruling granting substantial counsel fees to his prospective firm. *In re Continental Airlines Corp.*, 901 F.2d 1259, 1261-63 (5th Cir. 1990). Third, when the O'Neill Group objected to the order and award, Continental responded that the pilots should file a separate fair representation claim (R 163, Att. 2.2, p. 4) and eventually the bankruptcy court ruled that it would not reach any RLA issues but would leave them for this action (R 163, Att. 2.4, p. 18).

pp. 27-31). ALPA's *post hoc* justifications for the settlement, both in terms of it being the best bargain the union could get for its members and in terms of the alleged legal uncertainty surrounding the strikers' rights to fill vacancies, were developed at the appellate level.

G. **The Secret Strike Settlement and Its Effects.**

To understand the impact of the settlement agreement on the striking pilots and why ALPA wanted to hide its role in reaching the settlement, it is necessary to understand how the settlement agreement operated.

Before and during the strike Continental maintained a seniority-based bidding system. Under this system, only the most senior, most experienced pilots advance to captain, the position of ultimate responsibility in an aircraft (R 163, Att. 9, pp. 7-8). The strike settlement provided only limited opportunities for strikers to return to work at Continental and, for those who did, turned seniority on its head.

The settlement required striking pilots to choose among three options. Pilots who wanted to return to work were required to choose Option 1 or Option 3 (JA 81). Option 1 required pilots to execute a waiver of all claims against Continental. These pilots were called back to work in seniority order, but their right to bid for captain seats was lost because the settlement allowed Continental to "assign" them to their initial post-strike captain seat (JA 10-12). Continental exercised this right by assigning the returning strikers to the least desirable captain seats available, i.e., smaller aircraft that paid the



lowest salaries based in faraway cities.[16] Option 3 permitted pilots to keep claims against Continental, but provided that they could neither return to work nor become captains until after the Option 1 pilots (JA 11). Further, Option 3 pilots returned to work based upon the order in which Continental received their Option 3 selection papers, rather than by seniority (*id.*).

The settlement agreement reserved the first 100 captain vacancies in the 85-5 bid for nonstriking pilots who otherwise had insufficient seniority for these positions under Continental's normal bidding procedures (JA 82).[17] Continental then assigned the 70 most senior Option 1 pilots to the next 70 captain seats in the 85-5 bid (*id.*). After these first 170 captains vacancies were filled, the settlement provided for a 1:1 allocation between striking pilots and nonstriking pilots for *all* future captain seats, regardless of seniority (JA 13).

The settlement also provided a severance option, Option 2, for pilots who elected not to return to work (JA 83). Option 2 required the pilots to resign and waive almost all claims against Continental in exchange for

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[16] In its amicus brief, Continental argues that it wanted to control these assignments in case the returning strikers sought to interfere with normal flight operations. Brief p. 27. Continental's argument is both irrelevant and *post hoc*. Nothing in the record suggests that the pilots had even thought about such post-strike conduct, or that Continental actually separated them on their return. Virtually all of the alleged "facts" in Continental's brief are unsupported in this record and will be heavily disputed if this matter goes to trial.

[17] The settlement also allowed the nonstrikers to move into the first officer positions available in the 85-5 bid. This left only the second officer positions in the 85-5 bid and the second officer positions that would become vacant as nonstrikers advanced to first officer for returning strikers, regardless of their seniority or the positions they held at Continental before the strike. Second officer is an entry level pilot position.

severance pay (*id.*).[18] Pilots who had taken temporary employment at other airlines were excluded from Option 2 (JA 22). The evidence shows that ALPA and Continental negotiated Options 1 and 3 so as to make Option 2 the most attractive of the available alternatives and thereby reduce the number of strikers returning to work (R 163, Att. 2.1, p. 48, Att. 3.1, pp. 132-34, Att. 5.2, pp. 1247-48).

The sacrifice of the seniority system was only the most conspicuous of the strike settlement's terms. ALPA also agreed to withhold all representational services and strike benefits from any pilots choosing Option 3, to move the pilots hired during the strike (the "permanent replacements") ahead of many of the returning strikers on the seniority list, to dismiss litigation filed on behalf of pilots without first obtaining their consent, and to allow Continental to harass returning strikers through "psychological testing" of their fitness for reemployment. As previously mentioned, the settlement also excluded all retired and resigned pilots (JA 10-11, 22).

The effects of the secret strike settlement are long-lasting. Because a nonstriker who obtained a captain position under the settlement cannot be displaced in later bids by even the most senior pilot, nonstriking pilots will be able to maintain their allocated captain vacancies as long as they wish. Striking pilots, on the other hand, had their seniority rights severely curtailed.

### H. The Disenfranchisement of the Striking Pilots.

Immediately after the bankruptcy court entered the secret strike settlement as an order and award, ALPA put the Continental MEC into custodianship and placed

[18]The only claims Option 2 preserved were claims for the few days' wages and benefits that were earned prior to Continental's bankruptcy that were not yet paid (JA 26). These claims were minuscule compared to the pilots' other claims for, among other things, contract rejection damages and furlough pay.



the Continental pilots on inactive status so that they could not vote in union elections (R 149, Ex. 70). ALPA explained this custodianship on the grounds that Continental was in bankruptcy (*id.*, p. GG000195).[19] By that time, however, Continental had been in bankruptcy for over two years. Moreover, pilots for Frontier Airlines, who shortly thereafter were merged into Continental and whose employment circumstances were thus identical to the Continental pilots, were *not* put on inactive status and were allowed to vote (*id.*). The disenfranchisement of the striking pilots of Continental provided president Duffy's margin of victory at the next union general election (R 149, Ex. 70).

## SUMMARY OF ARGUMENT

ALPA exceeded its authority and settled a strike without member knowledge or required approval; agreed to a settlement that was worse than an unconditional offer to return to work and that discriminated between strikers and nonstrikers; misrepresented to its members the settlement terms and its responsibility for them; and disenfranchised its own strikers so that they could not vote in the next union general election, thus perpetuating the settling officials in office. Under these circumstances, the Fifth Circuit properly found that the union was not entitled to summary judgment on the striking pilots' duty of fair representation claim.

ALPA's conduct must be measured against the standard for the duty of fair representation set forth in *Vaca*

[19]Upon placing the MEC into custodianship and the pilots on inactive status, Duffy appointed the four pilot negotiators as the Continental custodians and "Contract Transition Consultant[s]" with monthly salaries of $4,250.00 (R 149, Ex. 21). There was affidavit testimony below that Duffy previously had told the MEC members, including these four negotiators, that he would take care of the people who cooperated with him (R 149, Ex. 67, ¶ 13). The Continental pilots remain in custodianship more than five years later despite provisions of the Labor-Management Reporting and Disclosure Act making custodianship longer than 18 months presumptively unlawful.

*v. Sipes*, 386 U.S. 171 (1967). Under the *Vaca* standard, the union violates its duty of fair representation if its conduct is "arbitrary, discriminatory, or in bad faith." *Id.* at 190. This Court has never retreated from the *Vaca* standard, and has cited it in a number of duty of fair representation decisions, including two cases decided just last term. *Chauffeurs Local No. 391 v. Terry*, 110 S. Ct. 1739 (1990); *United Steelworkers of America v. Rawson*, 110 S. Ct. 1904 (1990).

A fair representation standard that allows judicial review for rationality is the same standard applied to other agents, and has the salutary effect of deterring union misconduct that a standard requiring actual proof of subjective hostility does not. ALPA's argument that the *Vaca* standard results in excessive judicial oversight has not been borne out by experience. In fact, the lower courts are very careful in adjudicating union misconduct and, in the over one thousand reported decisions relying upon *Vaca*, have usually found in the unions' favor unless, as here, there is true abandonment of a union's responsibilities.

ALPA's attempt to justify its conduct on the grounds that the law concerning strikers was uncertain in 1985 is without merit. There is no evidence in the record that ALPA was, in fact, legally uncertain when it settled the strike or that its agreement was motivated by this alleged "uncertainty." This is merely the *post hoc* rationalization of counsel developed at the appellate level.

The actual evidence is that ALPA was advised and believed that the returning strikers were entitled to fill all vacancies with their seniority intact. In addition, Continental told ALPA that it would accept the returning strikers back with full seniority if the union made an unconditional offer to return to work. ALPA never communicated this offer to the striking pilots or their elected representatives.



Independent of any legal uncertainty, there is additional misconduct here upon which a jury could find that ALPA breached its duty of fair representation. ALPA exceeded its authority in agreeing to a settlement without first getting member approval; it circumvented union policies designed to prevent rogue union action; it misrepresented to an entire group of striking pilots that it would include them in the settlement and it did not; it maneuvered to have the settlement entered as a bankruptcy court order so that it would not have to take responsibility for it and then denied its participation in arriving at the settlement; and, after the settlement was reached, it disenfranchised the striking pilots by placing them on inactive status so that they could not vote in the next union general election. That disenfranchisement provided the margin of victory for the union president when the election occurred. Given all of these facts, a jury is entitled to conclude that the settlement was arbitrary and irrational.

Finally, ALPA breached its duty of fair representation by agreeing to a settlement that illegally discriminated against strikers by conferring "superseniority" preferences on nonstrikers after the strike. The result of the superseniority preference was that, two years after the strike, a nonstriking pilot received a job preference over a striking pilot who had 19 years greater seniority. In the contemporaneous notes of the chairman of the MEC negotiating committee, the settlement agreement "bastardized the seniority system forever." Such arrangements have been illegal, and properly so, ever since this Court's decision in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

## ARGUMENT

### I. ALPA's Conduct In Secretly Settling The Strike Must Be Measured Against The Duty Of Fair Representation Standard Set Forth In *Vaca v. Sipes*.

The duty of fair representation is the essential protection for employees who, like these pilots, have been abandoned by their union. In this Court's jurisprudence, the duty of fair representation is the quid pro quo for the individual employee's surrender of his bargaining rights. *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944). The duty stands as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. at 182. Unlike the unfair labor practice provisions of the Railway Labor Act, which are targeted at the public interest underlying federal labor policy, the duty of fair representation targets the wrong done the individual employee and compensates him for the damage inflicted. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). The standard for the duty of fair representation must therefore be calculated to allow the trier of fact to hold accountable a rogue union that has run roughshod over its members, as ALPA did here. [20]

We agree with the Solicitor General that a union violates its duty of fair representation *whenever* it acts arbitrarily, discriminatorily, or in bad faith. *See Vaca v.*

[20]Although the RLA does not expressly include a duty of fair representation, Congress has indicated its approval by incorporating a parallel duty in Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101, *et seq. See Karahalios v. Nat'l Federation of Federal Employees*, 109 S. Ct. 1282, 1285-86 (1989). Congress' approval of the standard articulated in *Vaca v. Sipes* is also implicit in the lack of any contrary congressional action in the 23 years since *Vaca* was decided. *See NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 182 (1981) (lack of congressional action construed as implicit approval of long-standing Board policy).



*Sipes*. This standard applies whether the union is negotiating contracts, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 333 (1953), administering them, *Vaca v. Sipes*, 386 U.S. at 190-91, or doing the myriad other things that are not easily categorized, but that fall within the union's representative functions. *See, e.g., Breininger v. Sheet Metal Workers International*, 110 S. Ct. 424, 429 (1989). ALPA's attempts to narrow the duty of fair representation to instances of subjective hostility or other improper motive not only conflict with this Court's precedents and a significant body of appellate case law, but also would immunize unions from the meaningful judicial review necessary to ensure that they do not abuse the trust placed in them.

#### A. This Court Has Adopted *Vaca v. Sipes* As the Standard Governing the Duty of Fair Representation.

ALPA asks this Court to abandon the standard for the duty of fair representation in *Vaca v. Sipes*, 386 U.S. 171 (1967), which this Court and the lower federal courts have followed in over one thousand subsequent decisions. [21] In *Vaca v. Sipes*, this Court addressed a union's refusal to arbitrate an employee's grievance. An employee who had been discharged for physical disability had his doctor certify that he could return to work. The employer's doctor disagreed. The union carried the grievance through the preliminary steps, but ultimately concluded with the employer that arbitration would be futile. At trial, plaintiff proved that in fact he had been capable of working. The jury found for the plaintiff and against the union and the Missouri Supreme Court affirmed.

In reversing, this Court described the duty of fair representation as "a statutory obligation to serve the

[21]As of 1985 there were 1,225 reported decisions relying on *Vaca*. *See* B. Aaron, "An Overview of Fair Representation," in *The Changing Law of Fair Representation* (Cornell University Press 1985) (J. McKelvey, ed.), p. 16.

interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177, *citing Humphrey v. Moore*, 375 U.S. 335 (1964). In so holding, this Court rejected the union's argument that judicial scrutiny of union conduct or the bases of union decisions is inappropriate, or that such review should be left to a specialized tribunal like the National Labor Relations Board:

> [F]air representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the *Steele* decision.

386 U.S. at 181.



This Court has invoked the *Vaca* standard in a variety of factual situations.[22] In *Czosek v. O'Mara*, 397 U.S. 25 (1970), the Court reinstated a lawsuit by merged employees against their union for arbitrarily and capriciously refusing to process plaintiffs' claims. The Court held that the employees had stated a cause of action for breach of the duty of fair representation. *Id.* at 27. In *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), a lawsuit involving the union's failure to properly process a grievance, the Court reaffirmed *Vaca* in stating that the fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employee's rights. *Id.* at 48. And, in *Breininger v. Sheet Metal Workers International*, 110 S. Ct. 424 (1989), this Court refused to create an exception to *Vaca* for the operation of union hiring halls, albeit in the preemption context.

Just last term this Court issued two duty of fair representation opinions; both relied on the standard set forth in *Vaca* and affirmed its application beyond the grievance context. In *Chauffeurs Local No. 391 v. Terry*, 110 S. Ct. 1339 (1990), a case involving the Seventh Amend-

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[22]ALPA overreaches when it suggests at pp. 22-25 of its brief that this Court's decision in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), narrows the standard for the duty of fair representation set forth in *Vaca*. The cited *Lockridge* passage is dictum and the Court has never cited *Lockridge* as the proper standard of conduct in any duty of fair representation case. Instead, the standard cited by this Court in every reported decision since *Lockridge* is the "arbitrary, discriminatory, or in bad faith" standard of *Vaca*. ALPA also construes *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), too narrowly. There the Court affirmed the district court decision that the negotiation of the seniority system at issue was not "arbitrary, discriminatory or in anyway unlawful." 345 U.S. at 333. The Court held that a union is empowered to make concessions "in the light of all relevant considerations." *Id.* at 338. This is the same "arbitrary standard" articulated later in *Vaca*, 386 U.S. at 177, and followed by the Fifth Circuit in *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976), and in the decision below.

ment right to jury trial, the Court quoted *Vaca* and analogized the duty of fair representation to the fiduciary duties owed by trustees. The Court categorically stated:

> The duty [of fair representation] requires a union "to serve the interests of all members [in a bargaining unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." ... A union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective bargaining agreement.

*Id.* at 1344. And, in *United Steelworkers of America v. Rawson*, 110 S. Ct. 1904 (1990), a case involving federal preemption of state law, the Court reiterated that while a union's performance of a mine inspection could be measured against the *Vaca* standard, it could not be measured against state law negligence principles.

### B. The *Vaca* Standard Is a Fair One.

*Vaca*'s standard for the duty of fair representation is not a harsh one. It affords unions a "wide range of reasonableness" in their conduct. *See United Steelworkers*, 110 S. Ct. at 1912, *citing Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).[23]

The duty of fair representation parallels the duty a trustee owes trust beneficiaries, a common law analogy this Court applied to unions last term in *Chauffeurs Local No. 391 v. Terry*, 110 S. Ct. 1339, 1346 (1990). *See* Restatement (Second) of Trusts §§ 170-185 (1954). The *Vaca*

[23]While *Vaca* itself does not define "arbitrary," this is a common term with a commonly understood meaning. Black's Law Dictionary defines arbitrary as: "fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic." *Black's Law Dictionary*, p. 104 (6th ed. 1990).



standard also resembles the duties that agents owe their principals.[24] *See* Restatement (Second) of Agency §§ 378-398 (1958). Nor would the union here be treated differently than corporate officers and directors under the business judgment rule if the *Vaca* standard were applied. *See Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 275 (2d Cir. 1989) (judicial review of business judgment requires review of the content of the judgment and the information on which it is based); *Cramer v. General Telephone & Electronics Corp.*, 582 F.2d 259, 275 (3d Cir. 1978) (court must review reasonableness of corporate director's judgment where it appears so unreasonable as to be outside the bounds of discretion). Even legislatures, the analogy used in *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944), undergo judicial review of the rationality of their actions. *E.g., City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985). We see no reason why a union should be entitled to escape review of the rationality of its acts when a trustee, an agent, a corporate officer or director, or a legislature cannot.

More important, the standard of fair representation that ALPA proposes, which would require proof of subjective hostility, cannot enforce the union's affirmative responsibilities. It would enable a union to escape liability if it treats all of its striking members equally badly, as ALPA did here.

The subjective hostility standard is unsatisfactory for another reason. Irrational acts are often powerful evidence that a union's conduct is motivated by discrimination or bad faith. To ignore irrationality and to require plaintiffs to prove subjective hostility when unions, particularly sophisticated ones like ALPA, can easily hide any "smoking guns," will severely undercut a member's

[24]In the present case ALPA acknowledged that, after August 23, 1985, it proceeded to bargain as the common law agent of the pilots, making the agency analogy particularly apt (R 131, pp. 27-31).

ability to challenge even gross union misconduct. "To foreclose juries from examining the evidence and drawing the appropriate inferences in such cases is to virtually guarantee that such union conduct will never be remedied." M. Goldberg, *The Duty of Fair Representation*, 34 Buffalo L. Rev. 89, 148 (1985). Without a standard that holds out the possibility of judicial review when the union acts arbitrarily or perfunctorily, the duty of fair representation becomes merely a paper promise, hardly a quid pro quo for the surrender of individual bargaining rights.

### C. Judicial Application of the *Vaca* Standard Has Not Resulted in Excessive Interference With Union Autonomy.

ALPA asks this Court to reject the position of the O'Neill Group and the Solicitor General and to retreat from *Vaca* and all of its progeny for the stated reason that judicial review for arbitrariness or irrationality will result in excessive judicial oversight at the expense of union autonomy. ALPA's argument is pure fantasy. The circuit courts of appeal have uniformly applied the *Vaca*



standard to union conduct in negotiations for years without the ill effects that ALPA predicts.[25]

The lower courts are careful to ensure that the union misconduct at issue is truly arbitrary and not merely negligent. Indeed, unions generally prevail unless there is wholesale abandonment by the union as there was here. The most exhaustive empirical study of union fair representation cases of which we are aware analyzed 809 decisions beginning in 1977, the year after this Court's decision in *Hines v. Anchor Motor Freight Co.*, 424 U.S. 554 (1976), nine years after *Vaca*, and in 1983. M. Gold-

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[25]For cases where the courts of appeal have applied *Vaca* to union negotiations, see *Barr v. United Parcel Service, Inc.*, 868 F.2d 36, 43 (2d Cir.), *cert. denied*, 110 S. Ct. 499 (1989). *Haerum v. Air Line Pilots Association*, 892 F.2d 216, 221 (2d Cir. 1989); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1013-14 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *Burchfield v. United Steelworkers of America*, 577 F.2d 1018, 1020 (5th Cir. 1978); *Ackley v. Local Union 337, Int'l Brotherhood of Teamsters*, 910 F.2d 1295 (6th Cir. 1990); *Morgan v. St. Joseph Terminal R. Co.*, 815 F.2d 1232, 1234 (8th Cir.), *cert. denied*, 484 U.S. 846 (1987); *American Postal Workers Union Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1105 (D.C. Cir. 1981).

In its opening brief, ALPA incorrectly asserts that the Ninth Circuit applies a subjective hostility standard to negotiations and restricts *Vaca* to grievance handling (pp. 12-13, n.6). Just last year, that circuit decided *Bernard v. ALPA*, 873 F.2d 213, 216 (9th Cir. 1989), in which the *Vaca* test was applied in determining ALPA had breached its duty of fair representation when it negotiated for discriminatory contract provisions that militated against nonmembers. In addition, ALPA incorrectly characterizes the Eleventh Circuit opinion in *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989), as requiring subjective hostility in the negotiation context. The court there actually restated the *Vaca* standard. *Id.* at 1520. Finally, ALPA cites *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983) and *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986), for the proposition that judicial review is unnecessary to curb union misconduct. These cases are unpersuasive because they essentially eliminate the duty of fair representation altogether. They have not been followed outside the Seventh Circuit.

berg, *The Duty of Fair Representation*, 34 Buffalo L. Rev. 89 (1985). Contrary to ALPA's doomsday predictions, the study reported little or no deleterious effect on union conduct as the result of the *Vaca* standard. *Id.* at 158. Interestingly, the study also noted that ALPA had a disproportionately large number of cases charging union misconduct given its small size. *Id.* at 122.

ALPA also overreaches when it argues that the *Vaca* standard will seriously undermine the national labor policy favoring collective bargaining. The converse is more likely. We doubt whether any employees would surrender their individual rights to collective bargaining if there was no check on the arbitrary exercise of union power. Moreover, ALPA's argument was rejected in *Vaca* and in *Breininger v. Sheet Metal Workers International*, 110 S. Ct. 424 (1989). The purpose of the duty of fair representation is not to further federal labor policy, but to protect employees from arbitrary union conduct and to compensate them for their individual injuries. As Justice White once noted, the courts (not the NLRB) are the "primary guardians of the duty of fair representation." *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970).

Finally, the subjective hostility standard ALPA proposes would, to quote *Breininger*, "eliminate some of the prime virtues of the duty of fair representation — flexibility and adaptability." 110 S. Ct. at 436. The *Vaca* standard is easily articulated and provides the appropriate measure of guidance to the lower courts, who then apply it to the variety of situations that implicate the duty of fair representation. The critical question is the application of the *Vaca* standard to the facts of each case. To these facts we now turn.



## II. Whether ALPA Breached Its Duty Of Fair Representation In This Case Cannot Be Resolved On Summary Judgment; It Is A Question For The Trier Of Fact.

### A. Summary Judgment Is Singularly Inappropriate Here.

We believe that this Court granted certiorari to confirm that the *Vaca* standard applies to all union conduct because that was the question presented in ALPA's petition for certiorari. We do not believe this Court granted certiorari to re-write the standards for summary judgment.[26] Yet ALPA argues, with the Solicitor General's concurrence, that all of its misconduct should be excused because it was legally uncertain about the rights of returning strikers in 1985 and, therefore, struck the best deal that it could. ALPA cites no evidence in the record that its officers ever considered or were motivated by legal uncertainty in their rush to end the strike. To the contrary, and as we shall develop, the actual evidence is that ALPA was advised and believed that the law was clear (and it was), and that the law entitled returning strikers to fill all vacancies and to retain their seniority rights.

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[26]The standard for summary judgment promulgated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), mirrors that for a directed verdict. Furthermore, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S. at 255. *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (analyzing summary judgment in the context of the nonmoving party's burden of proof); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (same).

Given the variety of facts that must be considered in deciding whether a union has met its duty of fair representation, it is not surprising that the law defining the duty of fair representation has developed in cases tried to juries, not in summary judgments. *Chauffeurs Local No. 391 v. Terry*, 110 S. Ct. at 1354 (Stevens, J. concurring), *citing Vaca v. Sipes*, 386 U.S. 171 (1967); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979); and *Bowen v. United States Postal Service*, 459 U.S. 212 (1983).

Thus, to accept ALPA's proffered excuse is to accept as true facts that are either not in the record or are in dispute, and to ignore the competing inferences that can be drawn from the facts that are in the record. Certainly there already is enough evidence for a reasonable jury to conclude that ALPA was motivated by anything *but* its legal uncertainty.[27] This Court should not accept ALPA's invitation to act as the factfinder here.

In addition, ALPA and the Solicitor General ignore other aspects of ALPA's misconduct that independently compel a finding that ALPA breached its duty to those pilots. Summary judgment, under the principles stated by this Court and applied by the Fifth Circuit, was error.

### B. ALPA's *Post Hoc* Rationalizations for Its Conduct Are Without Merit.

We disagree with ALPA and the Solicitor General's accusation that the Fifth Circuit improperly engaged in *post hoc* analysis of ALPA's conduct. The reverse, in fact, is true. The reasons offered by ALPA for its conduct are *post hoc*; indeed, they are for the most part pure argument of counsel. It is telling, for example, that both ALPA and Continental have relied on material in their

[27] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." *Anderson v. Liberty Lobby*, 477 U.S. at 255.



briefs that *is not in the record* below to support their arguments here.[28]

If one were to read the briefs of the Solicitor General and ALPA, one would conclude that the union here was at most negligent because it was honestly torn as to its rights and remedies in October 1985 and struggled against a recalcitrant employer to get the best deal it could for the pilots who had gone out on strike. The "honesty" of ALPA's legal uncertainty argument is a disputed issue of fact. There is no evidence in this record that the union negotiators were troubled about their legal entitlement to the 85-5 bid positions or to any subsequent positions. There is no evidence in this record that they pressed the point with Continental (this latter is not surprising given the earlier directive from union leadership on high that the strike was to be terminated).[29] There is no evidence in this record that the

[28] Out of all of the deposition testimony ALPA has cited to this Court, none of the cited pages were cited in the Motion for Summary Judgment, reply or response to the Motion for Reconsideration filed in the district court, and only one page was cited in the Fifth Circuit. These items therefore are not properly a part of the record on appeal. *Ricciardi v. Children's Hosp. Medical Center*, 811 F.2d 18 (1st Cir. 1987) (deposition filed but not brought to court's attention not considered on appeal); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 649 n. 1 (7th Cir. 1985) ("evidence not presented to the trial court may not be offered on appeal"); 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 3956 (1977); 9 J. Moore, *Moore's Federal Practice* ¶ 210.04 at 10-15 (1982).

Even the arguments of counsel are new. ALPA's summary judgment motion asserted that the settlement was a court order, not an act of ALPA, and that ALPA owed no duty because it was not the pilots' statutory bargaining representative. Therefore, ALPA made no effort to support its motion with affidavits or other evidence that it acted rationally, honestly, or in good faith.

[29] Continental itself had every incentive to settle the strike in October 1985 because the settlement would enhance its ability to get its plan of reorganization confirmed (R 163, Att. 2.4, p. 4). Thus, the alleged intransigence of Continental is also a fact dispute.

negotiators honestly believed what they were doing was reasonable. To the contrary, MEC negotiating committee chairman Schnell's testimony states that they had gone *beyond* what was reasonable.

In fact, the law was not uncertain: strikers were entitled to fill vacancies and the 85-5 bid openings were vacancies. *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (returning strikers entitled to reinstatement); *Randall v. NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (unfair labor practice for employer to advance nonstrikers to special-rated positions before reinstating strikers).

The facts demonstrate that ALPA's actual view of the law was the view it successfully advanced in the district court in the United Airlines litigation: the strikers were entitled to return with seniority intact and to fill *all* vacancies. *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985) [30]. The legal advice the high echelons of ALPA received was: (1) if the pilots had made an unconditional offer to return to work they would retain their seniority (R 163, Att. 5.5, pp. 165-70); (2) Continental had been willing to recall striking pilots in seniority order since before August 1984 (R 163, Att. 5.5, pp. 53-54); (3) Continental had returned striking machinists and flight attendants in seniority order following their unions' unconditional offers to return to work; (4) "the normal rule was that the company would be obligated to recall strikers in order of seniority . . ." (R 163, Att. 5.5, pp. 160-61); and (5) an unconditional offer

[30]This Court may, of course, take notice of ALPA's position, successfully taken, in the prior United litigation, and should do so to prevent ALPA from playing fast and loose with facts material to its state of mind. *See* 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2410 at 359-61 (1971). *See, e.g., MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986) (taking judicial notice of a motion filed by a party in another proceeding to note its knowledge of material facts at a prior time).



to return to work would allow Continental pilots to preserve their litigation against Continental (R 163, Att. 5.5, pp. 157-58), which was one of the MEC's objectives in a strike settlement (R 163, Att. 5.1, pp. 678-79).

In addition, ALPA had asked Continental during the September 1985 MEC meeting how Continental would treat strikers after an unconditional offer to return, and received the response that Continental would recognize an unconditional offer by ALPA on behalf of striking pilots and return them all to work in seniority order (R 163, Att. 5.5, pp. 165-70). This communication, which was before the 85-5 bid award, was not reported to the MEC. [31]

We recognize and will address in part III, *infra*, ALPA's argument that Continental had no legal obligation to return striking workers with their seniority intact, particularly in respect to the 85-5 bid. The trier of fact in this case, however, could find that regardless of any legal requirement Continental *would* have returned workers with seniority intact based on its historical practice and on the conversations it had with ALPA representatives in September 1985, that ALPA knew this, and

[31]In its amicus brief Continental relies almost exclusively on materials outside this record to argue that it would not have taken the strikers back because it had no legal obligation to do so. We therefore advise the Court that if this matter goes to trial we shall offer as evidence an internal memorandum that Continental circulated to the nonstrikers in August 1985, after the district court's decision in *ALPA v. United Air Lines, Inc.*, that was disclosed in a related piece of litigation. In that memorandum, Continental concisely restates the law governing the rights of returning strikers. In Continental's words:

> As you are well aware, we have consistently allowed returning strikers to bid on an equal — according to seniority — basis with working pilots for new vacancies, *as required by law*. That practice is consistent with what the court in Chicago has ruled: that *artificial and unnecessary preference or superseniority is illegal* in the United case.

(Emphasis added.)

that ALPA ignored it. ALPA's actual knowledge of the law is highly relevant where, as here, it attempts to excuse misconduct on the grounds of its own uncertainty as to how to proceed. *See generally Auriemma v. Rice*, 910 F.2d 1449, 1453 (7th Cir. 1990) (where government agent's state of mind is in issue subjective inquiry into knowledge and motive appropriate) and cases cited therein.

Thus, the record evidence is not that the union here had no alternatives from which to choose and struck the best deal that it could. The record evidence is simply that union leadership did not want to be tagged with making an unconditional offer to return, even if that alternative was better than a negotiated settlement. Given the facts that existed *at that time*, there was no reason for the union to deviate from the position it took in respect to United Airlines and this unexplained decision is, itself, reason for finding that ALPA's conduct was arbitrary. *See Acadian Gas Pipeline System v. FERC*, 878 F.2d 865, 868 (5th Cir. 1989); *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 882 (D.C. Cir. 1978).

We respectfully suggest that ALPA and the Solicitor General are just plain wrong. It is they, not the Fifth Circuit, who are guilty of hindsight review.

### C. Independent Factors Show that ALPA Breached Its Duty of Fair Representation.

Even if one conceded that the law was unclear and that Continental was intransigent, that does not excuse ALPA's decision to settle the strike without the required authority, to misrepresent to the retired and resigned pilots that they would be included, to engage in a panoply of activities designed to disguise their own participation in and responsibility for the settlement terms, and to disenfranchise the striking pilots. This is not an isolated instance of mere negligence. It is a pattern of misconduct and deception culminating in a settlement that



has no justification in this record other than ALPA's failure to satisfy the duty of fair representation.

#### 1. ALPA exceeded its authority.

The MEC Policy Manual required MEC approval of any settlement ALPA reached with Continental. In addition, the MEC passed a resolution at the beginning of the strike requiring MEC approval of any agreement granting concessions to Continental (R 132, p. 17; R 163, Att. 5.1, pp. 507-513).[32] ALPA represented throughout the strike that it would bring any settlement to the pilots as a whole for a vote (R 149, Ex. 47, ¶ 2, Exs. 48, 49, Ch. 17, p. B000048; R 163, Att. 7.23, Z012255). ALPA thus exceeded its authority by agreeing to the strike settlement without first consulting or obtaining approval from its striking members and the MEC.

Exceeding the scope of authority would be a breach of a representative's duty in any capacity, and should be here. *E.g., Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556, 1564 (11th Cir. 1990), *petition for certiorari filed* Sept. 17, 1990; *Rollins v. May*, 473 F. Supp. 358, 363 (D.S.C. 1978), *aff'd*, 603 F.2d 487 (4th Cir. 1979). Breaking a promise to allow union members to ratify any

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[32]This point was disputed in the district court ALPA argued below that a later secret resolution in 1984 rescinded the 1983 MEC resolution on ratification and gave the negotiating committee authority to settle, which authority was then "transferred" to the pilot negotiators by Resolution 3 in 1985 (R 153, p. 16). This interpretation is incorrect (R 149, Ex. 67, ¶¶ 6, 7). Minutes from a Los Angeles area pilot meeting in April 1985 confirm that the 1983 ratification resolution was still in effect in 1985 (R 163, Att. 15, p. Z011360), and chief pilot negotiator Schnell testified that he never even knew about the 1984 resolution (R 163, Att. 5.2, pp. 1470-71, 2031-33). There also was MEC member testimony that any agreement had to be brought back to the pilots for a vote (R 149, Ex. 75). Finally, by its terms, the 1985 resolution only authorized the designated negotiators to *pursue* a resolution to the strike, without mentioning ratification or the 1984 resolution, or granting authority to reach a final agreement (R 149, Ex. 3.1, p. Z002985).

agreement and violating the union policy requiring at least MEC approval also breaches the duty of fair representation. *See Acri v. International Association of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir.), *cert. denied*, 479 U.S. 816 (1986); *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235 (5th Cir. 1980).[33]

2. **ALPA tried to disguise what it did.**

Having exceeded its authority in agreeing to a strike settlement and having compounded that failure by acceding to a settlement that left striking pilots worse off than an unconditional offer to return to work, ALPA entered into a pattern of deception and misrepresentation as to how the settlement was reached and what its terms were. ALPA represented, for example, that the bankruptcy court had "imposed" the strike settlement without any participation by ALPA (R 149, Exs. 14, 15). The reverse was true. As early as October 18, 1985, president Duffy sent a mailgram to the ALPA board of directors that "preliminary meetings . . . will continue through this weekend under Judge Roberts' supervision with our purpose being *to get a court order* with rules governing the orderly return to work" (emphasis supplied) (R 163, Att. 7.3). Bruce Simon, ALPA's lawyer, originally asked

[33]Contrary to ALPA's suggestions, the LMRDA is not the sole remedy against union misrepresentations as to approval rights. The LMRDA grants a statutory voting right whenever a union's constitution or bylaws require it, 29 U.S.C. § 411(a)(1). In the present case, the pilots and the MEC placed additional limitations on ALPA's authority, not found in its constitution or bylaws, and ALPA accepted these provisions and represented to the pilots that it would follow them. While ALPA's breach of these promises may not violate the technical requirements of the LMRDA, nothing in that Act suggests that a union cannot voluntarily assume additional ratification responsibilities and breach its duty of fair representation if it fails to meet these additional requirements. *See Alexander v. International Union of Operating Engineers*, 624 F.2d 1235 (5th Cir. 1980).



the bankruptcy judge to "be creative" and enter the settlement as an order and award (R 163, Att. 4, 013483).

When this master plan was in place, ALPA kept the final set of Continental negotiations secret and manufactured the excuse of a "gag order" imposed by the bankruptcy court to avoid required communications with the MEC. There was no gag order and, in fact, Continental was fully apprising the working pilots as the negotiators proceeded. Once the bankruptcy court indicated its willingness to enter the settlement as a court order, therefore relieving president Duffy from having to sign it, ALPA conceded *all significant issues* to Continental.

After the order and award was entered, ALPA told its members it would have no effect on seniority (R 149, Ex. 15). This was untrue (JA 11-15). ALPA then falsely denied any responsibility for the terms and conditions of the settlement, when in fact it had agreed to all of the material terms and conditions before the bankruptcy court approved the proposed order and award (R 163, Att. 5.6, pp. 157, 179).

We ask a question that we do not intend to be rhetorical. If the strike settlement truly was the best deal that could be struck, why did ALPA go to such pains to disguise it? ALPA's deceptions may not, by themselves, prove that the settlement was arbitrary. They certainly are evidence from which a reasonable jury could infer that the union itself knew it had acted arbitrarily in ending the strike when it did and on the terms to which it agreed.

3. **ALPA defeated the union democratic process.**

ALPA, in advocating its limited standard of review, and the Solicitor General, in excusing the union's performance here, argue that the ultimate check on rogue union action is the union democratic process. This process theoretically allows union members to "throw the rascals out" at regularly scheduled elections.

We realize that, as Judge Easterbrook develops, one recourse for union members dissatisfied with their leadership is to vote for other officers. *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d at 244. But when, as is part of the whole offensive conduct here, the victims are disenfranchised, the union must expect closer scrutiny. In the now famous "Carolene Products Footnote 4," the Court noted that an active judicial role can be justified when the Court is enforcing, *inter alia*, "rights of the political process," 3 Rotunda, Novak & Young, *Constitutional Law*, p. 475 (West Pub. Co. 1986); *see United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938); for subsequent development and the view that the courts must protect the openness of political processes, *see* J. Ely, *Democracy and Distrust*, p. 75 (1980). To put it baldly, on these facts a jury might reasonably conclude that the union abandoned its striking members and then cut off their only remaining self-help recourse by disenfranchising them. Here is how ALPA did it:

First, ALPA circumvented the very union procedures designed to ensure fair representation and adequate accountability during the negotiation process. These procedures had been implemented by the MEC after a prior group of negotiators (in a different matter) had failed to keep the MEC informed.

Then, almost immediately after the entry of the order and award, ALPA placed the MEC in custodianship and put all the striking pilots in the membership category of "inactive status." By placing the striking pilots in this category, ALPA deprived them of the right to vote in the next ALPA election.

While ALPA explained the custodianship on the grounds that the pilots were on strike and their employer was bankrupt, its explanation is not persuasive. ALPA waited until two years after Continental's bankruptcy filing to take this action. Moreover, ALPA allowed a group of pilots who flew for Frontier Airlines, which had



merged into Continental and therefore who were in identical circumstances, to continue their active union status. Not surprisingly, at the next union election president Duffy retained his office by the narrowest of margins. This margin would not have existed but for the disenfranchisement of the pilots seeking relief here.

**4. ALPA agreed to a strike settlement that was worse than an unconditional offer to return to work.**

The process ALPA followed in prematurely ending the strike resulted in a settlement that was, in the district court's words, "atrocious in retrospect." That the settlement was bad does not automatically mean that ALPA violated its duty of fair representation. The jury is entitled, however, to review ALPA's decision to opt for the settlement in its appropriate factual context, and to conclude that it was irrational and arbitrary.

Based on this record, a jury could find that ALPA unilaterally decided to end the strike and ignored the established negotiating procedures to affect that end. It told retired and resigned pilots they would be protected long after cutting them out of the negotiations.[34] It kept the pilots' MEC representatives in the dark as to the negotiations, and fabricated a "gag order" from the bankruptcy court to explain the silence. It ignored the readily available alternative of an unconditional offer to return to work, and declined to inform the MEC of that alternative when it became known to ALPA. It reached a

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[34]ALPA's conduct was clearly arbitrary as to the pilots who retired and resigned based upon ALPA's representations that they would still be included in a settlement when, in fact, ALPA had already agreed with Continental to cut them out. *See Thomas v. Bakery Workers Local 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988) (union breached duty of fair representation when it "knew that plaintiffs' jobs were at risk, refused to negotiate to protect their interests, and then lied to one of them about their precarious situation"); *NLRB v. Local 282*, 740 F.2d 141 (2d Cir. 1984); *NLRB v. American Postal Workers Union*, 618 F.2d 1249, 1255 (8th Cir. 1980).

settlement which distinguished among pilots based upon the irrelevant and impermissible factor of whether they participated in the strike. It presented the settlement to the bankruptcy court for entry as a final, binding and nonappealable court order without approval by the MEC or a vote by the pilots. Then, in the end, rather than articulate a rational, reasonable basis for ignoring the normal negotiating procedures and agreeing to the settlement, ALPA denied any responsibility for it.

These facts, taken together, do not permit a court to determine on summary judgment that ALPA's conduct was "inclusive of a fair and impartial consideration of the interests of all employees." *Tedford v. Peabody Coal Co.*, 533 F.2d at 957. They demonstrate instead that ALPA acted arbitrarily, outside of required procedures, and in breach of its duty of fair representation. *Id.*; *see Alexander v. International Union of Operating Engineers*, 624 F.2d 1235, 1240-41 (5th Cir. 1980); *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1089 (9th Cir. 1978).

**5. At the very least the record presents triable issues of ALPA's motives and intent.**

Even by ALPA's proposed standard of subjective hostility, summary judgment was wrong because there are issues of fact as to ALPA's motive and intent. *See, e.g., International Union of Operating Engineers Local 406 v. NLRB*, 701 F.2d 504, 508 (5th Cir. 1983) (trier of fact may infer discriminatory animus from circumstances surrounding union's departure from normal procedures); *Jones v. Western Geophysical Co.*, 669 F.2d 280 (5th Cir. 1982); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974).[35]

After two years, the Continental strike had become an obvious blemish on Duffy's record as ALPA president and a threat to his reelection. Yet he could not afford to end

[35]The Solicitor General appears to agree that there are triable issues as to ALPA's bad faith in this case. Amicus Brief, p. 30, n.22.



the strike by "surrendering" over the objection of the Continental MEC. Therefore, ALPA counsel Bruce Simon, participating in the final negotiations as Duffy's personal delegate, devised the strategy of submitting the secret settlement to the bankruptcy court for issuance as a court order.

A trier of fact could infer motives of personal gain and bad faith from this record.[36] Such inferences would support the pilots' claim that ALPA breached its duty of fair representation by acting in response to those motives rather than the pilots' best interests at the time. As this Court has held: "The bargaining representative, ... is responsible to, and owes complete loyalty to, the interest of all whom it represents." *Ford Motor Co. v. Huffman*, 345 U.S. at 338. Accordingly, union action based on prospects of political gain or for reasons of political expediency breaches the duty of fair representation. *See Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976) (remanded with instructions "that in order to be absolved of liability the [u]nion must show some objective justification for its conduct beyond that of placating the desires of the majority of the unit employees at the expense of the minority"); *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967).

## III. The Settlement Impermissibly Discriminates Between Strikers And Strikebreakers Solely Because The Strikers Engaged In Concerted Activity.

ALPA also breached its duty of fair representation by agreeing to a discriminatory settlement that confers superseniority preferences on nonstrikers after the strike. These preferences extended to the most desirable job vacancies available when the strike ended, and thereafter to all captain vacancies pursuant to a 1:1 ratio. The

[36]The secret settlement also included dismissal of litigation filed against one of the pilot negotiators, MEC Chairman Higgins (see JA 33; R 149, Ex. 114, ¶ 13), raising a further issue of personal gain and bad faith.

1:1 ratio required one nonstriker to advance to captain, out of seniority, for each returning striker who would otherwise be entitled by virtue of seniority to become a captain. Such post-strike superseniority is unlawful under the RLA, has a long-lasting effect, and, when agreed to by a union, constitutes a breach of the duty of fair representation.

### A. The Settlement Discriminated Against Striking Pilots.

There is little dispute in the prior briefs that post-strike superseniority preferences favoring nonstriking employees are unlawful under the RLA. *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989) (hereafter "*TWA v. IFFA*"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954). ALPA downplays the superseniority aspects of this settlement and then characterizes the superseniority as temporary or transitional as if such discrimination is lawful if it does not last too long.[37] The record and the applicable law for ALPA's position are otherwise.

#### 1. The 1:1 ratio for post-strike bidding discriminated against returning strikers.

The record is undisputed that before and during the strike Continental awarded pilot positions according to a seniority bidding system in which seniority was measured by original date of hire. In the airline industry, the seniority system fulfills a basic requirement for airline safety. It also rewards pilots for their years of service with the airline because captain is the most prestigious

[37]This is yet another area that illustrates the inappropriateness of summary judgment. In the *United* case, ALPA submitted substantial evidence of the discriminatory aspects of United's rebid procedure. *See ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985). Here, discovery into the discriminatory aspects of the settlement agreement was cut short by the district court's grant of summary judgment (R 149, Ex. 114).



and highest paying pilot position, as well as the position of greatest flying responsibility in the cockpit. Indeed, the opportunity to bid captain is the single most important aspect of pilot seniority and why seniority is crucial to an airline pilot (R 149, Ex. 81, p. 340).

Putting aside the 85-5 bid positions and the discriminatory manner in which ALPA agreed to allocate them, the settlement altered this seniority bidding system to provide that all post-strike, post-85-5 bid captain positions would be allocated on a 1:1 ratio between pilots who went on strike and pilots who did not.[38] No other criteria would be used in the post-strike bidding — half the post-strike captain positions were to be awarded to nonstrikers in preference to the returning strikers regardless of their relative seniority, experience or flying ability.

The adverse effect of this superseniority preference on the striking pilots is direct and long-lasting. Nonstrikers who have been given captain positions cannot be bumped, and therefore hold their captaincies in preference to more senior returning strikers as long as they so desire. Moreover, even though the 1:1 ratio applies only to returning strikers' initial post-strike captain positions, theoretically allowing them to bid without restriction on the nonstriker side of the equation thereafter, they are locked into their initial positions by virtue of various

[38]The Solicitor General simply misapprehended the record facts in concluding that the 1:1 ratio applied only until the strikers returned to work. Amicus Brief, p. 33. In fact the ratio applied *after* they returned to work because, contrary to Continental's practice during the strike, the settlement precluded pilots from bidding while they were awaiting recall from the preferential recall list. The Solicitor General further misapprehended the record facts in concluding that the only permanent effect of the settlement was to allow nonstrikers to retain positions obtained during the strike. *Id.* In fact the 1:1 ratio allowed nonstrikers to obtain captain positions *after* the strike, in addition to the 85-5 bid captain positions allocated to them in the settlement.

"equipment freezes" that limit a pilot's opportunity to bid from one aircraft to another for specified numbers of years (R 149, Ex. 103, Sec. 18). It is no wonder that MEC negotiating committee chairman Schnell concluded that the settlement "bastardized [seniority] beyond all recognition" and "f—ked my people forever" (R 149, Ex. 1).

For a concrete example, as of December 23, 1987, more than two years after the strike ended, the next pilot who would become a captain was a nonstriker who had worked at Continental for four years and held seniority No. 1442. In line *after* him was a returning striker who had worked for 23 years, had seniority No. 65 and had flown as a captain at Continental for more than 14 years before the strike. It is likely that pilot No. 65 was flying as a captain at Continental before pilot No. 1442 was old enough to drive, but under the settlement pilot No. 1442 would become a captain ahead of pilot No. 65 and effectively receive 19 years of seniority credit for not participating in the strike. This preference is nearly identical to the 20-year seniority credit this Court held unlawful in *NLRB v. Erie Resistor Corp.*

Contrary to ALPA's brief (p. 5 n.3), there is not a shred of record evidence, and none is cited, for the assertion that "this [1:1] formula was necessary during the post-strike transition period to facilitate an orderly integration of striking pilots back into the work force." Indeed, the ratio applied to bids submitted by strikers *after* they returned to work, well beyond the strike settlement date, and not during their transition back to work.[39] It is hard to imagine there could be any legitimate business reason for advancing less senior, less experienced pilots to the most important seat in the cockpit solely because they did not strike.[40]

[39]Under the settlement terms the 1:1 ratio would continue on all bidding done through at least December 31, 1988, more than three years after the strike ended, and indefinitely thereafter subject to arbitration (JA 14).



**2. Revisions to the pilot seniority list gave permanent superseniority to the replacement pilots Continental hired during the strike.**

The settlement also altered the Continental pilot seniority list to place Continental's permanent replacements, the new pilots Continental hired during the strike as distinguished from pilots who crossed the picket line ahead of the striking pilots who were at the end of the pre-strike seniority list. This change, totally ignored in prior briefs, gave the replacement pilots permanent superseniority over the affected strikers.

**3. The allocation of 85-5 bid captaincies to nonstrikers was improper.**

ALPA also agreed to give the first 100 captain positions on the 85-5 bid to nonstrikers out of seniority and in preference to returning strikers.[41] It is undisputed that the 85-5 bid was for positions Continental projected for 1986, and that these positions were unstaffed when the strike ended on October 31, 1985. There is no evidence that nonstrikers had even begun training for these new positions before the strike was settled. The nonstrikers merely held bid awards, or promises from Continental that they would be advanced to those positions

[40]Continental asserts in its brief that it unilaterally removed the 1:1 ratio in late 1987, which suggests that there was no legitimate operational reason for it in the first place.

[41]The pilots have uncovered evidence in other litigation against Continental that reveals that the nonstrikers who received their choices for the first 100 85-5 captaincies ranged in seniority from Nos. 1082 to 1454 and had one to seven years of service (see R 163, Att. 13). In comparison, the first returning striker eligible under Option 1 to be assigned to a captaincy had seniority No. 2 and 34 years of service. *O'Neill v. Continental Air Lines, Inc.*, No. H-87-259, pending in the United States District for the Southern District of Texas (plaintiffs' motion for partial summary judgment, Aff. of K. Kunde).

in the future; there was no issue of displacing the non-strikers from positions they held during the strike. *See TWA v. IFFA.* These positions were vacancies and the returning strikers were entitled to them. *Id.*; *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *see Randall v. NLRB*, 687 F.2d 1240, 1243 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (unlawful for employer to advance nonstrikers to special-rated jobs before reinstating strikers).

**B. ALPA's Discrimination Was Unlawful.**

The record shows that ALPA's discrimination was intentional (at least ALPA negotiator Schnell knew the result), direct (ask pilot No. 65) and long-lasting (according to Schnell "forever"). Such discrimination based as it is on the employees' participation in statutorily protected conduct, is invidious, unrelated to any lawful purpose and, when done by a union, in breach of the duty of fair representation.

The superseniority preferences ALPA agreed to give nonstriking pilots, at the expense of the returning strikers, are fundamentally and undeniably unlawful under the labor statutes, as this Court has held in every case that has addressed the issue. *TWA v. IFFA*, 109 S. Ct. 1225 (1989); *NLRB v. Erie Resistor*, 373 U.S. 221 (1963); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

In *Erie Resistor* the Court held squarely that post-strike superseniority preferences that discriminate against employees on the basis of their participation in lawful strike activity are unlawful. Substitute the word "bid" for "layoff" and the Court could have been writing about this case when it concluded:

> A super-seniority award necessarily operates to the detriment of those who participated in the strike as compared to nonstrikers. [It] creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps:



> those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is reemphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.
>
> [S]uperseniority by its very terms operates to discriminate between strikers and nonstrikers . . . and its destructive impact upon the strike and union activity cannot be doubted.

373 U.S. at 230-31. The Court therefore upheld the NLRB's determination that post-strike superseniority is illegal *per se* under federal labor law. *Id.*

The circuit courts of appeal likewise are unanimous in holding that superseniority is illegal. *See NLRB v. Bingham-Willamette Co.*, 857 F.2d 661 (9th Cir. 1988); *ALPA v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) (superseniority preferences to nonstriking pilots illegal under RLA); *Independent Federation of Flight Attendants v. Trans World Airlines*, 819 F.2d 839 (8th Cir. 1987), *rev'd in part on other grounds*, 109 S. Ct. 1225 (1989); *George Banta Co. v. NLRB*, 686 F.2d 10, 18-20 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) (unlawful for employer to grant preferential reinstatement and seniority rights to employees who abandoned the strike before it ended); *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 841-42 (5th Cir. 1978) (unlawful discrimination to assign returning strikers to less desirable shifts); *NLRB v. Transport Co. of Texas*, 438 F.2d 258 (5th Cir. 1971) (nonstrikers and strikers must be treated equally after a strike and cannot be put in separate groups for purposes of lay-off rights); *Great Lakes Carbon Corp. v. NLRB*, 360 F.2d 19, 21-22 (4th Cir. 1966) (superseniority plan favoring employees who worked during a strike is unlawful on its face).

### C. ALPA's Agreement to a Discriminatory Settlement Breached Its Duty of Fair Representation.

A union does not have the power to negotiate without limitation.[42] "[I]t is enough for present purposes to say that the statutory power to represent a craft and to make contracts . . . does not include the authority to make among members of the craft discriminations not based on such relevant differences." *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 203 (1944). *Accord Hettenbaugh v. ALPA*, 189 F.2d 319, 321 (5th Cir. 1951).

Consequently, a union breaches the duty of fair representation when it negotiates a superseniority system that discriminates against some employees on unlawful grounds such as race, sex or protected activity. *Id.*; *Bernard v. ALPA*, 873 F.2d 213, 216 (9th Cir. 1989) (ALPA breached duty of fair representation in seniority merger proceedings; "[w]ide latitude . . . does not mean a union may discriminate on the basis of union membership"); *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207 (6th Cir. 1984) (union's agreement to seniority provisions which discriminated on basis of concerted activity breached its duty of fair representation), *cert. denied*, 470 U.S. 1084 (1985); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797 (2d Cir. 1974) (discrimination in seniority

[42]ALPA's discussion of recall rights must be distinguished from the discriminatory treatment afforded strikers *after* they have been recalled. *See, e.g., Lone Star Industries*, 122 LRRM (BNA) 1162 (1986) (employer could maintain prior reinstatement practice at conclusion of strike but committed unfair labor practice by discontinuing seniority bidding practice after the strike). Additionally, ALPA's assertions that a union can waive the pilots' rights to be free from discrimination is incorrect. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983) (union may bargain away its members' economic rights, but it may not make concessions that deleteriously affect the employees' rights to engage in concerted activity); *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974). As this Court has held, superseniority is unlawful precisely because it impairs the employees' rights to engage in concerted activity. *NLRB v. Erie Resistor Corp.*, 373 U.S. at 231.



based on union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 282 (N.D. Ind. 1977) (granting summary judgment where union discriminated against female employees). ALPA cites no authority holding otherwise because there is none.[43]

ALPA and the Solicitor General nonetheless suggest that Continental could have imposed the same superseniority based upon legitimate business justifications for doing so. This point is immaterial because the record shows that Continental did not assert any business justification in these negotiations.[44] It also is wrong. *Erie Resistor*, 373 U.S. 221. *See TWA v. IFFA*, 109 S. Ct. at 1239 n.5 (Brennan, J. dissenting) ("in *Erie Resistor* we held grants of superseniority to be *per se* illegal, regardless of the business necessity that might be found in the particular case . . ."). *See also* 45 U.S.C. § 152, Eighth

[43]*Continental Gem City Ready Mix Co. & Jack Roberts*, 270 NLRB No. 1260 (1984), 1984-85 CCH NLRB ¶ 16467, does not stand for the proposition that a union and an employer can negotiate for superseniority. In that case an employer proposed to settle a strike under provisions which moved three nonstrikers up on the seniority list, the union put the proposal to membership vote and *the membership approved it*. The case holds only that the strikers waived their discrimination claim against the employer by ratifying the agreement, and the analysis makes clear that the union's agreement without ratification would violate labor law. *See Wallace Corp. v. NLRB*, 323 U.S. 248, 256 (1944) ("It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with [the union] as it would have been had the company done it alone.").

[44]We are unaware of any authority which permits an employer to discriminate against strikers *after* a strike. Indeed, Continental had an announced policy that strikers were entitled to come back with their seniority (R 163, Att. 14.2), and advised ALPA in September 1985 that it would recognize their seniority upon recall. And the need to hire replacements to stay in business during a strike disappears when the strike ends and strikers are available for work.

("The provisions of said paragraphs (proscribing employer coercion) are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.") Indeed, it is an unfair labor practice for the employer to insist on such provisions. *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964) (employer's insistence on a superseniority provision was an unlawful refusal to bargain and converted strike to an unfair labor practice strike).

That leaves only the issue of whether ALPA could nevertheless agree to these provisions if, as ALPA suggests, its backside was against the wall and Continental insisted on them as a condition of settlement. Put another way, can the union agree to do what the very statute that authorizes its existence makes unlawful? The answer must be no. *See UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982) ("The terms of any collective-bargaining agreement must comply with federal laws"); *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (union may not choose a position which interferes with a "policy Congress has imbedded in the labor laws"). Indeed, the essential holding in *Steele* was that the union cannot make agreements that discriminate in violation of federal law, and breaches a duty of fair representation when it does. 323 U.S. at 203 ("Congress plainly did not undertake to authorize the bargaining representative to make such discriminations."). *See Hettenbaugh v. ALPA*, 189 F.2d at 321 ("It is only when collective bargaining agreements are unlawfully entered into, or when the



agreements themselves are unlawful in terms or effect, that federal courts may act."). [45]

ALPA's inability to concede superseniority is compelled by the collective bargaining policies espoused by ALPA, the Solicitor General and Continental. [46] Superseniority is unlawful because it discriminates against employees who participated in a strike called by their union, and thereby discourages their participation in the future. *Erie Resistor*, 373 U.S. at 232. The right to strike itself, however, "is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *Id.* at 234. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) (recognizing employees' right to strike under the RLA).

There can be no effective collective bargaining if the employer, with the union's consent, can retaliate against strikers. Indeed, it is telling that the Continental pilots are still without a recognized union or a collective bar-

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[45] The RLA and NLRA differ in some respects but they are similar with respect to the back to work rights at issue here. *See TWA v. IFFA*, 109 S. Ct. at 1232-33 (recognizing that both statutes "protect an employee's right not to strike" and declining to impose limitations on employee rights at the conclusion of a strike under the RLA "beyond the limitations even imposed by the NLRA"); *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-84 (1969). Thus, cases decided under either statute provide persuasive authority on these issues. *See, e.g., ALPA v. United Air Lines*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

[46] As for the Solicitor General's contention that an overriding goal of the RLA is to avoid interruptions to commerce, Brief, pp. 30-31, that goal is not advanced in the least by conferring benefits on non-strikers after a strike, when the strikers are themselves ready, willing and able to resume employment. *Erie Resistor*, 373 U.S. at 232. Superseniority also contravenes the RLA's express goal of "forbidding any limitation upon the freedom of association among employees." 45 U.S.C. § 151a.

gaining contact more than five years after this strike. If, under all the circumstances, ALPA was no longer willing or able to be the pilots' statutory representative, rather than acting contrary to these controlling principles, it should have just said so. The duty of fair representation, however, prevents a union from abandoning its members and agreeing to an illegal, discriminatory settlement. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976) (recognizing that the collective bargaining process cannot function if the union does not fulfill its obligations with some minimum degree of integrity); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 70 (1975) ("union cannot lawfully bargain for the establishment or continuation of discriminatory practices").

## CONCLUSION

This Court should affirm the Fifth Circuit ruling that the *Vaca* standard governs a union's duty of fair representation in a negotiation context. Under any standard that has been proposed to this Court, there are facts that require presentation to a trier of fact. We respectfully request that the standard adopted by the Fifth Circuit, and advocated by both the O'Neill Group and the Solicitor General, be adopted and that this case be remanded for trial under that standard.

RESPECTFULLY SUBMITTED.

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